No. 93-1415

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

HOSPITAL ASSOCIATION OF NEW YORK STATE,
Petitioner,

v.

THE TRAVELERS INSURANCE COMPANY, HEALTH INSURANCE ASSOCIATION OF AMERICA, AMERICAN COUNCIL OF LIFE INSURANCE, LIFE INSURANCE COUNCIL OF NEW YORK, INC., AETNA LIFE INSURANCE CO., AETNA HEALTH PLANS OF NEW YORK, INC., MUTUAL OF OMAHA INSURANCE COMPANY, THE UNION LABOR LIFE INSURANCE COMPANY, PROFESSIONAL INSURANCE AGENTS OF NEW YORK, INC. TRUST, NEW YORK STATE HEALTH MAINTENANCE ORGANIZATION CONFERENCE AND HEALTH SERVICES MEDICAL CORPORATION, MVP HEALTH PLAN, WELLCARE OF NEW YORK, MID-HUDSON HEALTH PLAN, OXFORD HEALTH PLAN, CAPITAL DISTRICT PHYSICIAN'S HEALTH PLAN, CHOICECARE LONG ISLAND, INDEPENDENT HEALTH, TRAVELERS OF NEW YORK, PHYSICIANS HEALTH SERVICES, PREFERRED CARE and U.S. HEALTHCARE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Petitioner Hospital Association of New York State ("HANYS") respectfully submits this Brief in reply to the

Brief In Opposition submitted on behalf of The Travelers Insurance Company, Health Insurance Association of America, and the other Respondents joining in that Brief. No reply is made to the Brief In Opposition submitted on behalf of the New York State Health Maintenance Organization Conference and the other health maintenance organizations joining in that Brief.

I. CONFLICT BETWEEN CIRCUITS

Although the Second Circuit expressly declined to follow the Third Circuit's reasoning in *United Wire, Metal and Machine Health and Welfare Fund v. Morristown Memorial Hospital*,[1] (A-24 n.3; A-53 n.2), Respondents assert that there is no conflict between the two cases, relying on two frivolous arguments.

Respondents assert that there is no conflict because the Third Circuit might have decided *United Wire* differently had it known that the Second Circuit would subsequently abrogate the rationale of *Rebaldo v. Cuomo*, 749 F.2d 133 (2d Cir. 1984), *cert. denied*, 472 U.S. 1008 (1985). *Rebaldo*, however, was neither dispositive nor controlling in *United Wire*; the Third Circuit subscribed to *Rebaldo's* economic impact analysis simply because it believed that *Rebaldo's* analysis made eminent sense. The Third Circuit specifically characterized the reasoning in *Rebaldo* as "persuasive" (995 F.2d at 1194), and stated that the touchstone of *Rebaldo's* analysis was that the *Rebaldo* Court was " 'dealing . . . with a generally applicable statute that makes no reference to, [and] functions irrespective of, the existence of an ERISA plan,' . . . and that affects such plans only by increasing their costs of doing business." *Id.* at 1195. The Third Circuit further emphasized that it was "the absence of a direct nexus to ERISA plans and the limited nature of the statute's impact on such plans that put the pricing regulation in *Rebaldo* beyond the scope of § 514 preemption." *Id.* The

[1] 995 F.2d 1179 (3d Cir.), *cert. denied*, 114 S. Ct. 382 (1993).

fact that the Second Circuit decided not to follow *Rebaldo* does not mean that the Third Circuit would abandon the reasoning that it found so persuasive.

Respondents also argue that the cases are factually dissimilar because a New York State official observed in the Record below that in light of Blue Cross' open enrollment and community rating policies, the 13% differential helps "level the playing field," whereas no such comment was made by a New Jersey official in *United Wire*.[2] According to Respondents, if this observation had been made in *United Wire*, the Third Circuit may have found in favor of ERISA preemption.[3] Whether or not a similar statement can be found in the Record in *United Wire* is unknown, but also irrelevant. The two decisions are irreconcilable because they reached diametrically opposite results on laws that operate in virtually an identical manner. This remark is a mere distraction; the Second and Third Circuits reached opposite results because of a fundamental difference over the legal significance under ERISA of a state law's economic impact on ERISA plans.

II. IMPORTANCE OF THE DECISION

The provisions of New York's Public Health Law which create a 13% differential in rates among certain payors is a law of general application which operates without regard to a patient's ERISA coverage.[4] ERISA plans

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[2] In making this point, Respondents incorrectly attribute to New York officials a statement that the 13% differential plus the 11% assessment will make purchasers of health insurance "think twice as hard" about purchasing commercial insurance. *See* Brief In Opposition, at 15. In fact, this statement was made by a Blue Cross official and can hardly be the deciding basis for summary judgment in a matter of such import and magnitude. *See* page 821 of Joint Appendix filed with the U.S. Court of Appeals for the Second Circuit.

[3] Although Respondents vigorously attempt to distinguish the two cases, their briefs below relied heavily on the district court's decision in *United Wire*.

[4] Under the two provisions that make up the differential, New York Public Health Law sections 2807-c(1)(a) and 2807-c(1)(b),

enjoy the benefits of strict State control of hospital rates and costs, and retain the right to decide with whom, if anyone, to insure and, based upon that choice, what portion of the mandated rates to pay. Nevertheless, the Second Circuit held that ERISA preempts the 13% differential, a law of general application, because of its indirect economic impact on ERISA plans. Respondents argue that certiorari should not be granted because the Second Circuit decision is narrow, limited only to the differentials at issue, and does not "undermine a state's ability to regulate hospital rates." Brief In Opposition, at 13.

The contention that the Second Circuit's decision does not call into question a state's ability to regulate hospital rates is simply incorrect. The decision is having just that effect already in subsequent district court decisions. It is logical that if ERISA preempts the 13% differential because of its economic impact on plans, it may also preempt any law that creates a similar economic impact, even where the law, as here, is one of general application. Based on the Second Circuit's decision below, ERISA may preempt a state's right to set rates at all, since any mandatory rates, like the 13% differential, will have an economic impact on ERISA plans. Similarly, despite their denials, Respondents have not explained why ERISA would not preempt an array of other state laws, such as minimum staffing and medical waste disposal laws, or labor laws, whose costs are imposed on hospitals, reflected in their rates, and then indirectly passed on to all payors, including ERISA plans.[5]

ERISA plans are free to purchase Blue Cross, to purchase commercial insurance or to self-insure. The DRG rate under section 2807-c(1)(b) is 113% of the DRG rate under section 2807-c(1)(a), whether or not coverage is provided through an ERISA plan, a non-ERISA plan, or an individual policy. Hospitals also bill that same rate to patients who are covered under a variety of arrangements which do not provide ERISA coverage, such as a workers' compensation policy and "no-fault" insurance.

[5] This effect can be seen from another standpoint. Blue Cross plans operate in an entirely different legal environment from com-

Indeed, not only are plaintiffs in other litigations attributing a more expansive reading to the Second Circuit's decision, but various district courts within the Circuit are reading the Second Circuit's decision below as mandating that other state health care statutes are preempted because they result in an economic impact upon ERISA plans. In *New England Health Care Employees v. Mount Sinai Hospital*, No. 2:92 CV 1012 (JAC) (D. Conn.) (Feb. 24, 1994), the Connecticut District Court held that, based on the Second Circuit's decision below, ERISA preempts Connecticut's method of compensating hospitals for care rendered to the indigent, uninsured and underinsured based upon the statute's indirect economic impact on ERISA plans. Similarly, in *New York State Health Maintenance Organization Conference v. Curiale*, 93 Civ. 1298 (MBM) (S.D.N.Y.) (Feb. 25, 1994), the court held that the Second Circuit's decision below requires a finding that ERISA preempts a New York health insurance pooling regulation which was designed to allocate the costs of high-risk individuals among all third-party payors, regard-

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mercial insurers and self-insured plans. There will always be a difference in premiums among payors, or between premiums and the costs of self-insurance, because there is no uniformity in the regulation or operation of Blue Cross versus commercial or self-insurance. In New York, Blue Cross plans are non-profit, while commercial insurers are proprietary. Blue Cross rates must be approved by the Superintendent of Insurance after public hearings, (N.Y. INS. LAW § 4308 (McKinney 1985 & Supp. 1994)), unlike the rates of commercial insurers. Blue Cross plans also have traditionally provided community rating and open enrollment. These unique requirements create costs to Blue Cross plans that are reflected in premiums, which are not costs experienced by commercial insurers or self-insured plans. Thus, while the 13% differential is a cost incurred by patients of commercially-insured or self-insured plans, and not a cost of patients insured by Blue Cross plans, there are myriad costs imposed by statute experienced by Blue Cross plans that are not experienced by those other payors. To single out just one difference among costs experienced by one payor and not the other payors to argue that this difference might (not does) affect plan decisions, while ignoring all of the other cost differences that go the other way, is simplistic.

less of ERISA status.[6] Thus, whatever narrow reading Respondents want to give the Second Circuit opinion, their interpretation is not shared by courts being asked to apply its reasoning and holding.

Nor does the federal Omnibus Budget Reconciliation Act of 1993 (the "Budget Act")[7] result in the Petition's seeking "a mere advisory opinion." Brief In Opposition, at 3. While hospitals presently continue to receive amounts attributable to the 13% differential from Respondents, this occurrence is obviously the result of the Second Circuit's having stayed its mandate pending the petition for a writ of certiorari.

The Budget Act, designed specifically to deal on a temporary basis with the District Court decision below, added section 162(n) to the Internal Revenue Code to prohibit employers from deducting contributions to health plans for services between February 2, 1993 (the day before the District Court rendered its decision) and May 12, 1995, unless such health plans pay, *inter alia*, the 13% differential. This temporary tax incentive, however, does not moot the Second Circuit's ruling on the 13% differential because there nevertheless will be a substantial patient population that is unaffected by this amendment.

First, section 162(n) sunsets on May 12, 1995. There is no remedial statute in place that will provide a tax incentive next year for employers to contribute to health plans that pay the 13% differential. Second, even with section 162(n) in place, hospitals will still suffer eco-

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[6] In addition to these cases described above, several pending actions involve challenges to other components of a state's hospital reimbursement system. *See, e.g., Trustees of & the Pension Hospitalization Benefit Plan v. Cuomo*, 92 Civ. 5589 (E.D.N.Y.) (challenging New York's method of funding bad debt and charity care); *Connecticut Gen. Life Ins. Co. v. Cuomo*, No. 93-3648 (S.D.N.Y.) (challenging the hospitals' practice of balance billing).

[7] Pub. L. No. 103-66, § 13442, 107 Stat. 312, 568 (1993) (codified at 26 U.S.C.A. § 162(n) (West Supp. 1994)).

nomic losses as a result of the decision below. Section 162(n) does not require that ERISA plans pay the 13% differential until the law sunsets. Whether a plan does so is a voluntary decision, influenced only in part by the tax status of the employer. Many employers simply may not require a tax deduction for their contributions, such as tax-exempt employers or employers showing a loss. Furthermore, notwithstanding the tax deduction to employers, ERISA plan trustees have their own fiduciary responsibilities to their plans, not to the employer. Thus, certain trustees have already taken the position that under the fiduciary provisions of ERISA, they cannot pay the 13% differential.[8] In fact, in another action pending in the Second Circuit, ERISA plans have amended their complaint to join the U.S. Secretary of the Treasury and the Commissioner of Internal Revenue, challenging the constitutionality of section 162(n). *Connecticut Gen. Life Ins. Co. v. Cuomo*, 93-3648 (S.D.N.Y.).[9]

III. FEHBA

In its petition for a writ of certiorari, Petitioner HANYS explained that the same faulty reasoning that led to the Second Circuit's holding under ERISA has driven its holding under the Federal Employees Health Benefits Act ("FEHBA"), (5 U.S.C. § 8901, *et seq.* (1988 & Supp.

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[8] In *Trustees of & the Pension Hospitalization Benefit Plan v. Cuomo, supra*, plaintiffs contend that paying the 13% differential violates the trustees' fiduciary responsibilities.

[9] Respondents also state that New York's recent extension of the 13% differential moots the issues in this action. The Legislature, however, has merely moved back the earlier sunset date of December 31, 1993. 1993 N.Y. Laws ch. 731, §§ 35, 76(5). It has not "reenacted" that provision in some manner that could render this controversy moot. Respondents have not suggested here or elsewhere that they do not consider the Second Circuit judgment and order to have a continuing binding effect upon Petitioners. Nor have Respondents suggested that without the 11% and 9% assessments, the 13% differential would not have a sufficient economic impact on ERISA plans to avoid preemption.

IV 1992)). Should this Court determine to grant the petition on the ERISA-related issues, its decision almost certainly will be of significance to the proper determination of the FEHBA preemption issue. Accordingly, certiorari should be granted on the FEHBA issue as well, so that the results for ERISA and FEHBA preemption are consistent.

Respondents' contention that the Second Circuit's FEHBA holding is "solidly grounded" in (1) the language of the statute; (2) its legislative history; and (3) a reasonable administrative interpretation, (Brief In Opposition, at 22), is erroneous on each point. The statute clearly speaks only to taxes or fees imposed with respect to a payment from the FEHB Fund, and not to the method by which the amount of the payment is calculated. The legislative history supports that the preemption relates solely to premium taxes, and the administrative agency interpretation is inconsistent with the agency's own duly promulated regulations.

CONCLUSION

Based on the foregoing, the Petition of the Hospital Association of New York State for a writ of certiorari should be granted.

Respectfully submitted,

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